identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security

Citizenship and Immigration Services

PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street N.W.
Washington, D.C. 20536

[redacted]

MAR 22 2004

File: EAC 02 091 51708 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Helen E. Crawford for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The petition will be remanded to the director to request additional evidence and entry of a new decision.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker or professional. The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional evidence and asserts that the petitioner has established its ability to pay the beneficiary's proffered wage.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g) provides in pertinent part:

> (2) *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The issue raised on appeal is whether the petitioner has demonstrated its continuing ability to pay the beneficiary's proffered salary as of the priority date of the visa petition. The regulation at 8 C.F.R. § 204.5 (d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is March 12, 2001. The beneficiary's salary as stated on the labor certification is $11.87 per hour or $24,689.60 annually.

The petitioner initially failed to submit any evidence of its ability to pay the proposed annual salary of $24,689.60. On March 1, 2002, the director instructed the petitioner to submit additional financial information to support its ability to pay the beneficiary's proffered wage including the petitioner's 2000

tax return.

On August 5, 2002, the director denied the petition, citing the lack of the petitioner's response to the director's request for additional evidence.

On August 20, 2002, the petitioner moved to reopen the case based on its contention that it had sent a timely response to the director. The petitioner submitted persuasive evidence that the director had received the response by the May 27, 2002 deadline set forth in the director's earlier notification. The petitioner provided a copy of its response with the motion. It consisted of a statement of income for the period ending December 30, 2001, accompanied by a letter from an accountant. The accountant's letter, dated May 21, 2002, indicates that the statement of income was not audited or reviewed, but rather represented a compilation that was limited to the representations of management.

On March 11, 2003, the director concluded that evidence failed to establish that the petitioner had demonstrated that it had the continuing ability to pay the proffered wage. The director observed that the petitioner had failed to provide its 2000 tax return and any of the beneficiary's wage and tax statements. The director concluded that little reliance could be placed only on the petitioner's statement of income that was submitted without audit or review and represented a compilation of financial data.

On appeal, the petitioner provides a copy of its 2000 federal tax return and a copy of the beneficiary's 2000 wage and tax statement (W-2). The W-2 reflects that the petitioner paid the beneficiary $15,260.16 in wages in the year 2000. This represents $9,428.84 less than the proposed salary of $24,689.60. The petitioner's 2000 Form 1120S, U.S. Income Tax Return for an S Corporation, however, indicates that the petitioner declared $450,502 as ordinary income. This sum was more than sufficient to cover the difference between the proposed salary and the actual wages paid to the beneficiary in that year.

Since considerable delay has elapsed in this case, and the evidence discussed above only persuasively establishes the petitioner's ability to pay the beneficiary's proposed salary for the year immediately prior to the priority date, it is appropriate in this case to request updated financial information on remand that actually covers the priority date and subsequent periods.

Therefore, in view of the foregoing, the director's decision is withdrawn. The petition is remanded to the director to request further evidence relevant to the beneficiary's updated financial information pursuant to 8 C.F.R. § 204.5(g)(2). Similarly, the petitioner may also provide any further pertinent evidence within a reasonable time to be determined by the director. Upon receipt of all evidence, the director will review the record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.